

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

U. S. WIREFREE NORTHWEST, INC., a
Washington corporation,

Plaintiff,

v.

LOIS HUBBARD, an Ohio resident,

Defendant.

Case No. C05-1401FDB

ORDER GRANTING DEFENDANT'S
MOTION FOR PARTIAL SUMMARY
JUDGMENT

INTRODUCTION

U.S. Wirefree Northwest (hereafter U.S. Wirefree or Plaintiff) is in the business of operating and selling broadband wireless technology and service in Washington. Defendant Lois Hubbard holds and owns a license issued by the Federal Communications Commission (FCC) (WMI 350) to operate four wireless channels in and around the Olympia, Washington area.

On or about May 15, 1998, Jack Hubbard, Defendant's deceased husband, and Harlan Hansen entered into a MMDS Service Agreement (the Agreement) wherein Jack Hubbard, the "Carrier" agreed to lease to Hansen, the "Customer" the license and use of all of the Carrier's channel capacity under the License. Defendant Lois Hubbard is the legal successor in interest to Jack Hubbard under the License and Agreement. On or about June 13, 2000, Harlan Hansen assigned all his rights under the Agreement to Plaintiff, U.S. Wirefree.

1 U.S. Wirefree contends that Hubbard has not performed in accordance with the Agreement
2 and that on or about July 6, 2005 asserted for the first time that the Agreement terminated on May
3 15, 2003. U.S. Wirefree alleges breach of contract and requests a declaratory judgment and specific
4 performance.

5 Defendant Lois Hubbard moves for summary judgment regarding the term of the lease,
6 arguing that the initial term of the lease expired on May 15, 2002. Hubbard contends that U.S.
7 Wirefree never delivered, prior to November 15, 2003, a written notice of its intent to renew the
8 Lease and that it did not pay (until recently) the monthly recurring fee that was due for the last 13
9 months of that initial term, nor has it paid for any month after that.

10 Plaintiff U.S. Wirefree opposes Hubbard's motion and moves for summary judgment in its
11 favor, arguing that there is no genuine issue of material fact regarding whether U.S. Wirefree
12 properly and timely notified defendant of its intent to renew the subject Lease Agreement pursuant to
13 its terms, and that any alleged noncompliance with the lease's renewal provisions was technical in
14 nature and should be excused on waiver and estoppel grounds given the protracted course of dealing
15 between the parties after the alleged notice was due, the substantial forfeiture that will befall U.S.
16 Wirefree if the lease is terminated, and the absence of any prejudice to defendant if the lease is found
17 to have been renewed.

18 SUMMARY JUDGMENT STANDARD

19 Summary judgment is proper if the moving party establishes that there are no genuine
20 issues of material fact and it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). If the
21 moving party shows that there are no genuine issues of material fact, the non-moving party must go
22 beyond the pleadings and designate facts showing an issue for trial. *Celotex Corp. v. Catrett*, 477
23 U.S. 317, 322-323 (1986). Inferences drawn from the facts are viewed in favor of the non-moving
24 party. *T.W. Elec. Service v. Pacific Elec. Contractors*, 809 F.2d 626, 630-31 (9th Cir. 1987).

25 Summary judgment is proper if a defendant shows that there is no evidence supporting an

1 element essential to a plaintiff's claim. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). Failure of
 2 proof as to any essential element of plaintiff's claims means that no genuine issue of material fact can
 3 exist and summary judgment is mandated. *Celotex*, 477 U.S. 317, 322-23 (1986). The nonmoving
 4 party "must do more than show there is some metaphysical doubt as to the material facts."
 5 *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

6 The lease in question provides that it is to be construed in accordance with Nevada law (see
 7 *infra*). Under Nevada law, the question of the interpretation of a written contract when the material
 8 facts are not in dispute is a question of law. *Grand Hotel Gift Shop v. Granite St. Ins.*, 108 Nev.
 9 811, 815, 839 P.2d 599 (1992).

10 DISCUSSION

11 The MMDS Service Agreement, the Lease at issue, provides at Paragraph 2, *Initial Renewal*
 12 *Term* as follows (underscoring added to emphasize the pertinent part):

13 The term of this Agreement shall begin on the date of execution of this Agreement
 14 and shall continue for a period of sixty (60) months following this date. Customer
 15 U.S. Wirefree] shall also have the option to renew this Agreement for three (3)
 16 additional sixty (60) month terms under the same terms and conditions as contained
 17 herein provided Customer delivers to Carrier [Hubbard] a notice of intention to renew
 18 no later than six (6) months prior to the end of each term, assuming that Carrier's
 authorization to operation the Channels [sic] has been renewed as necessary by the
 FCC. Carrier shall use its best efforts to obtain such renewal. After the first renewal,
 Customer will retain the right of first refusal thereafter for the duration of the
 remaining terms herein defined under the condition of remaining current in all parts of
 this Agreement.

19 The Lease also provides at Paragraph 14 regarding *Notices* (emphasis added):

20 All notices, requests, consents and other communications hereunder shall be in
 21 writing and shall be effective upon receipt "

22 The Lease also provides at Paragraph 17, *Governing Law; Construction*, that Nevada
 23 substantive law (as distinct from procedural law, including conflicts law) applies. *See Restatement,*
 24 *Second, Conflict of Laws* § 187, comment *h* (1971).

25 The Lease in this case commenced May 15, 1998 for a sixty-month term and expired May 15,

1 2003. In order to renew the lease, U.S. Wirefree must have delivered to Hubbard a notice of
2 intention to renew no later than six months prior to the end of the term, that is, November 15, 2002.
3 FCC spectrum licenses often are analogized to “property.” *See, e.g., J. Berresford, et all, The Law*
4 *of Property and the Law of Spectrum: A Critical Comparison*, 13 CommLaw Conspectus 35 (2004).
5 Under Nevada law, for both commercial and residential leases, if a lease requires written notice to
6 renew the term of the lease, no renewal is effective without such written notice. *See Host Int’l, Inc.*
7 *v. Summa Corp.*, 94 Nev. 572, 574, 538 P.2d 1080 (1978)(right to renew is lost if notice is not given
8 as required by lease). Nevada law on leases of “goods” reaches the same conclusion; “a signed lease
9 agreement that excludes modification or rescission except by a signed writing may not be otherwise
10 modified” Nev. Rev. Stat. 104A.2208.

11 Hubbard contends that she has done nothing that constitutes a waiver of U.S. Wirefree’s
12 obligation to provide written notice of its intention to renew the Lease. To constitute an implied
13 waiver, her actions must clearly show that she intended to relinquish a known right. *Merrill v.*
14 *Dermott*, 113 Nev. 1390, 1400, 951 P.2d 1040 (1997)(certain rent concessions did not waive
15 expiration date of lease). Additionally, the Nevada UCC requires waivers of rights to be in writing.
16 Nev. Rev. Stat. 104(A.2107. It is undisputed that Hubbard did not provide a written waiver of the
17 renewal provision.

18 Hubbard also argues the upon expiration of the lease on May 15, 2003, without U.S.
19 Wirefree’s timely notice of intent to renew, U.S. Wirefree’s continued use of the channels created a
20 month-to-month tenancy. Under Nevada landlord tenant law, if a tenant continues occupying the
21 property after the expiration of the term of the lease, the tenancy is from month to month. Nev.Rev.
22 Stat. 118A.470 and .210. Such occupancy is on the same terms and conditions as were contained in
23 the rental agreement unless specifically agreed otherwise. *Id.* Nevada law regulating leases for
24 “goods” analyzes holdover tenants similarly to landlord-tenant law, that is, continued use of the
25 goods after the expiration of the lease entitles lessor to repossess the property and to accrued and

1 unpaid rent. Nev. Rev. Stat. 104A.2528.

2 U.S. Wirefree argues that the lease does not provide a form “notice of intention to renew” or
3 otherwise define what is meant by such notice, or what such notice should exactly contain. U.S.
4 Wirefree contends that it remained in continuous communication with Hubbard’s authorized
5 representatives, and that it continued to perform its obligations under the lease. (See Plaintiff’s
6 Opposition, p. 4 and 5.) Thus, argues U.S. Wirefree, under the lease provision of delivery of a
7 “notice of intent to renew,” by its course of conduct with Hubbard’s representatives, it provided
8 notice that it intended to renew its long-term lease. Even if the lease term is found to be incomplete
9 or ambiguous, extrinsic evidence may be admitted to determine the parties’ intent, supply omissions,
10 and explain ambiguities. *Sandy Valley Assocs. v. Sky Ranch Estates Owners Ass’n*, 117 Nev. 948,
11 953-54, 35 P.3d 964, 966 (2001). Thus, U.S. Wirefree’s ongoing communications with Hubbard’s
12 representatives and its ongoing performance under the lease constitutes compliance with the spirit
13 and intent of the renewal provisions and the parties’ conduct supports a conclusion that U.S.
14 Wirefree complied with the Lease’s renewal provision. U.S. Wirefree also argues that equitable
15 principles should excuse any technical non-compliance with the Lease’s renewal provisions.

16 CONCLUSION

17 Having considered the parties’ arguments and authorities, the Court concludes that
18 Defendant Hubbard is entitled to partial summary judgment regarding the term of the lease. The
19 Lease provision with respect to notice of intention to renew is unambiguous and the notice is
20 required to be in writing. Under Nevada law, if a lease requires written notice to renew the term of
21 the lease, no renewal is effective without such written notice. *See Host Int’l, Inc. v. Summa Corp.*,
22 94 Nev. 572, 574, 538 P.2d 1080 (1978)(right to renew is lost if notice is not given as required by
23 lease). Nevada law also provides that the written exercise of a lease renewal option need not be a
24 formal document, but it must contain a concise statement of definite and unequivocal intent to
25 exercise the renewal option according to the terms of the lease. *See Jay Gee Commerce, Inc. v.*

1 *Havas*, 89 Nev. 157, 158, 508 P.2d 1015 (1973). U.S. Wirefree has not shown that it provided a
2 simple, concise written statement of definite and unequivocal intent to renew the Lease for another
3 five year term.

4 U.S. Wirefree's argument that it is entitled to equitable relief to preclude forfeiture of its right
5 to renew the lease fails under the circumstances. First, Hubbard did not waive the requirement of
6 written notice. A waiver may be implied from conduct that evidences an intention to waive a right
7 or by conduct that is inconsistent with any other intention than to waive the right, *Mahban v. MGM*
8 *Grand Hotels, Inc.*, 100 Nev. 593, 596, 691 P.2d 421 (1984), but the conduct must speak the
9 intention clearly. *Reno Realty & Inv. Co. v. Hornstein*, 72 Nev. 219, 225, 301 P.2d 1051 (1956).
10 There must be clear evidence that Hubbard intentionally relinquished the right to receive written
11 notice of U.S. Wirefree's intent to renew the Lease for another five-year term. *See Merrill v.*
12 *Demott*, 113 Nev. 1390, 1400, 951 P.2d 1040 (1997). The acceptance of rent or other performance
13 does not imply any intent to release a lessee from an unrelated promise or condition. *See Reno*
14 *Realty*, 72 Nev. at 226. The FCC filings that U.S. Wirefree made with no objection from Hubbard
15 do not under the circumstances indicate that Hubbard unambiguously intended to waive strict
16 compliance with the notice of renewal provision of the Lease. As stated earlier, under Nevada
17 landlord tenant law, if a tenant continues occupying the property after the expiration of the term of
18 the lease, the tenancy is from month to month. Nev.Rev. Stat. 118A.470 and .210. Such occupancy
19 is on the same terms and conditions as were contained in the rental agreement unless specifically
20 agreed otherwise. *Id.* Thus, U.S. Wirefree's continuing to perform its obligations under the
21 contract are consistent with a month-to-month tenancy created when it failed to timely renew the
22 lease.


23 Whether U.S. Wirefree forgot to renew the Lease or willfully did so because of market
24 conditions or for some other reason, equitable relief does not apply. An untimely notice may be
25 excused equitably if (1) the delay in giving notice is slight, (2) the delay does not prejudice the lessor,

1 and (3) the lessee would suffer forfeiture or other substantial hardship if equitable relief is not
2 granted. *See* A. Corbin, Corbin on Contracts § 2.15, at 201-03 (J. Perillo ed., 1993). The delay here
3 was not slight, as the notice of intent to renew was due November 15, 2002, and the first writing that
4 even arguably expresses U.S. Wirefree's intention to renew the Lease is Mr. Mayse letter of July 6,
5 2005 – 32 months after the notice was due. Moreover, there would be substantial prejudice to
6 Hubbard if U.S. Wirefree were not permitted to exercise its renewal option, as Hubbard changed her
7 position based on U.S. Wirefree's failure to timely deliver written notice of its intention to renew the
8 Lease by entering into an agreement to sell her FCC License to Fixed Wireless Holdings, Inc. for a
9 substantial sum of money. 2d Sterkel Decl. ¶ 3, Ex. G.

10 NOW, THEREFORE, IT IS ORDERED:

- 11 1. Defendant's Motion for Partial Summary Judgment Regarding Term of Lease [Dkt. #
12 10] is GRANTED;
- 13 2. U.S. Wirefree Northwest, Inc. did not timely renew the Lease for another five-year
14 term and the Lease expired by its terms on May 15, 2003; and
- 15 3. After May 15, 2003, U.S. Wirefree's continued occupancy and use of Mrs. Hubbard's
16 licensed channels converted to a month-to-month tenancy.
- 17 4. Plaintiff's Cross Motion for Summary Judgment [Dkt. # 16] is DENIED.

18 DATED this 18th day of July, 2006.

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21 FRANKLIN D. BURGESS
22 UNITED STATES DISTRICT JUDGE
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